Supreme Court, U.S.
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No. 08-

IN THE SUPREME COURT
OF THE UNITED STATES OF AMERICA

MARK A. STEPHENS,

Petitioner,

v.

STATE OF WISCONSIN,

Respondent.

On Petition for a Writ of Certiorari
to the Wisconsin Court of Appeals

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

1. Should an individual be required to affirmatively invoke the right to silence during a custodial police interrogation with the same degree of certainty required by the "clear articulation rule" of Davis v. United States, 512 U.S. 452, 462 (1994), which requires a suspect to "unambiguously" request counsel in order to invoke the right to counsel, or should a broader standard apply, which relies on a presumption against implicit waiver of important constitutional rights and comports with the mandate in Miranda v. Arizona, 384 U.S. 436 (1966), and Michigan v. Mosley, 423 U.S. 96, 100 (1975), that interrogation must cease if a suspect indicates "in any manner" that he wishes to remain silent?

2. If the Davis "clear articulation rule" applies to the right to silence, is a suspect's statement to a detective that he did "not want to talk to you anymore, punk," a sufficiently clear articulation of his right to cut-off questioning such that police interrogation must cease?

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Mark A. Stephens petitions for a writ of certiorari to review the judgment of the Wisconsin Court of Appeals in the opinion below.

OPINION BELOW

The opinion of the Wisconsin Court of Appeals is at State of Wisconsin v. Stephens, ___ Wis. 2d ___, 751 N.W.2d 902 (Ct. App. 2008) and is reprinted, together with the Wisconsin Supreme Court order denying review, in the accompanying Appendix at APP 1-13.

JURISDICTION

The Wisconsin Supreme Court entered its order on July 28, 2008, denying review of the Wisconsin Court of Appeals' decision, which was issued on April 23, 2008, and which affirmed the petitioner's judgment of conviction. This Court has jurisdiction under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides in relevant part:

> No person shall be . . . compelled in any criminal case to be a witness against himself.

U.S. CONST. amend. V.

STATEMENT OF THE CASE

In this case, the Petitioner seeks to better delineate what is necessary for an individual to invoke the constitutionally guaranteed right to remain silent and to cut-off police questioning during a custodial police interrogation.

The state court of appeals in this case extended the "clear articulation rule" announced in the right to counsel context in Davis v. United States, 512 U.S. 452, 462 (1994), to a suspect's invocation of his right to remain silent and to cut-off police questioning. Under the Davis rule, to invoke the right to counsel after once

waiving that right and agreeing to speak with police, a suspect must "unambiguously request counsel." 512 U.S. at 459. However, this Court has never extended the Davis rule beyond questions relating to the invocation of the right to counsel under Edwards v. Arizona, 451 U.S. 477, and there is a split of authority in the lower federal and state courts on whether this same rule should apply to a suspect's attempt to exercise the right to silence.

As discussed later, there are good reasons to allow a lesser degree of specificity for a suspect to invoke the right to silence than Davis announced in the right to counsel context. The Petitioner invites this Court to re-examine the Davis rule and the unique set of policy considerations that led to that rule requiring an "unambiguous" invocation of the right to counsel, and to decide whether a different standard is appropriate for the invocation of the right to silence – one which relies on a presumption against implicit waiver of important constitutional rights and comports with this Court's mandate in Miranda v. Arizona, 384 U.S. 436 (1966), and Michigan v. Mosley, 423 U.S. 96, 100 (1975), that interrogation must cease if a suspect indicates "in any manner" that he wishes to remain silent.

The Petitioner, Mark Stephens, was arrested on suspicion of having entered a neighbor's home under false pretenses with the intent to steal. R.1: 2. He was transported to the police station where he was interrogated by two officers. After initially denying wrongdoing, Stephens eventually gave a statement admitting to the offense.

Stephens' defense attorney filed a motion to suppress the statement. The following facts were adduced at a hearing on that motion, during which a police officer, a detective, and the defendant testified.

At the police station, Stephens was placed in a small interview room, and had one hand cuffed to the table during his entire interrogation. R.43: 12, 13. A police officer read Stephens the Miranda Rights form. Id. at 16-17. Stephens initially agreed to answer questions. Id. at 18. He denied wrongdoing, telling that officer that he had been home all day. Id. at 19-20.

After a while, a detective entered the room and "took over the interview." Id. at 41. The detective aggressively challenged Stephens, and confronted him with alleged physical evidence the police had recovered, as well as other apparently incriminating facts. Id. at 42. The detective testified that Stephens then became angry, "slammed his fist on the table and said he was not going to talk to me anymore and referred to me as a punk." Id. at 43, 73. The detective did not leave or terminate questioning in response to this outburst.

Instead, the detective asked the defendant whether he "was invoking his right to have representation or if he would still speak to us." Id. at 43. The detective claimed that the defendant "clarified that he would continue to speak," but that "[h]e was just not happy talking to me." Id. The detective said that he "wanted to clarify again that he was not invoking his constitutional rights and he clarified that with me." Id. The same detective then continued the interrogation and eventually obtained a confession. The detective was

unable to explain why Stephens continued to voluntarily speak with him, despite his stated unwillingness to talk to him anymore. Id.

Stephens testified at the suppression hearing and denied that he waived his rights and voluntarily continued to talk to the detective after his outburst. He testified that the detective became "very aggressive" and abusive, and he believed the detective was trying to scare him into talking. Id. at 73. Stephens testified that he called the detective "a punk" because he didn't want to talk to him anymore and "that meant him and anybody else that stepped into the room." Id. at 73.

The trial court made a factual finding that Stephens "slammed his hand on the desk, leaned over and told [the detective]. . . he would not talk and he called [the detective] a punk." Id. at 104. The court further found that the detective continued to question Stephens about this statement, not once, but twice, ultimately getting a response that Stephens would talk. Id. Nonetheless, the court denied the motion to suppress and held that the questioning was appropriate and the statements were voluntary. Id. at 109-10.

Stephens appealed, and the Wisconsin court of appeals affirmed the trial court's pretrial ruling. The court of appeals applied the "clear articulation rule" of Davis, APP 4-5, and ruled that Stephens' statement was not "a clear articulation that he wanted to terminate the interrogation and the detective was not required to immediately walk away." APP 6. Although the trial court made no such finding, the court of appeals interpreted Stephens declaration as a desire not to

continue speaking to one particular officer, and held that a "declaration that a suspect does not wish to speak to a specific officer is not the invocation of the right to silence." APP 5-6. The Wisconsin Supreme Court denied review, and this petition follows.[1]

REASONS FOR GRANTING THE WRIT

I. This Court should accept review to resolve a split of authority in the state and federal courts on the question of whether the "clear articulation rule" of Davis v. United States, 512 U.S. 452, 462 (1994), which involved the invocation of the right to counsel, should apply equally to the invocation of the right to silence.

A defendant's Fifth Amendment right to remain silent encompasses two distinct protections. The first is the right, prior to questioning, to remain silent unless the suspect chooses to speak in the unfettered exercise of his own will. Miranda v. Arizona, 384 U.S. 436, 460, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966). The second is the right to cut off questioning. Michigan v. Mosley, 423 U.S. 96, 103-04, 96 S.Ct. 321, 326, 46 L.Ed2d 313 (1975). Through the exercise of his right to cut off questioning, a suspect can control the time at which questioning occurs, the subjects discussed, and the duration of the interrogation. Id. "Without the right to cut-off questioning, the setting of in-custody interrogation operates on the individual to overcome

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[1]A separate post-conviction issue concerning a breach of the plea bargain is not addressed in this petition.

[his] free choice in producing a statement after the privilege has been once invoked." Id. at 100-01. "If the individual indicates in any manner, at any time prior or during questioning, that he wishes to remain silent, the interrogation must cease." Id. at 100 (emphasis added). This ensures that the resulting statement is the reliable product of free will. Id.

Hence, the admissibility of statements obtained after the person in custody has invoked his right to silence depends under Miranda on whether his right to cut off questioning was "scrupulously honored." Mosley, 423 U.S. at 103-04.

However, in recent years the right to silence and to cut-off custodial police questioning has been diminished by the decisions of a number of courts which hold that an individual must unambiguously invoke the right to silence with the same degree of certainty as a suspect must request counsel under the "clear articulation rule" of Davis v. United States. There is presently a split of authority in the lower courts of this nation on the question of whether the same standard utilized by Davis in the right to counsel context, should also apply to the right to remain silent.

The determination of whether a suspect invokes his right to counsel is made by application of the "clear articulation" rule of Davis v. United States, 512 U.S. 452, 114 S.Ct. 2350, 129 L.Ed.2d 362 (1994). Under the Davis rule, to invoke the right to counsel after once waiving that right and agreeing to speak with police, a suspect must "unambiguously request counsel." 512 U.S. at 459. Davis held that a suspect need not say any

magic words and need not "speak with the discrimination of an Oxford don," but must invoke the right, through an oral assertion or non-verbal conduct which is clear and unambiguous. Id.

This case now presents a question of federal constitutional law never addressed by this Court – whether the Davis "clear articulation rule" rule for the right to counsel should apply as well to the invocation of the right to remain silent. There are good reasons why this Court should grant review and rule that Davis should not apply to the right to silence.[2]

The Davis rule developed because of the peculiar rules unique to the right to counsel, especially the "prophylaxis" applied under Edwards v. Arizona, 451 U.S. 477, 485-86, 101 S.Ct. 1880, 68 L.Ed.2d. 378 (1981). Edwards held that once a suspect invokes his right to counsel during custodial questioning, the police officers must cease questioning and thereafter must refrain from any further interrogation until counsel is present. Id. This Court has recognized the coercive nature of custodial interrogation and reasoned that by requesting the assistance of counsel an individual "expresses his own view that he is not competent to deal with the authorities without legal advice." Mosley, 423 U.S. 96, 110 n.2 (White, J. concurring).The Davis court noted that the Edwards rule created a "second layer of

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[2]For an excellent analysis and a proposal to satisfy the differing procedural safeguards between the right to counsel and the right to silence, see, Ambiguous Invocations of the Right to Remain Silent: A Post-Davis Analysis and Proposal, Wayne D. Holly, 29 Seton Hall L. Rev. 558 (1998).

prophylaxis for the Miranda right to counsel" to prevent police from badgering a defendant into waiving previously asserted Miranda rights. Davis, 512 U.S. at 458, quoting McNeil v. Wisconsin, 501 U.S. 171, 176, 111 S.Ct. 2204, 2208, 115 L.Ed.2d 158 (1991) and Michigan v. Harvey, 494 U.S. 344, 350, 110 S.Ct. 1176, 1180, 108 L.Ed.2d 293 (1990).

The Davis court considered whether an ambiguous reference to counsel was enough to trigger the right to counsel, and thus the application of the Edwards rule. The Davis court was particularly concerned that even an ambiguous or equivocal reference to counsel could severely hamper law enforcement's legitimate need to investigate if the Edwards rule requiring the cessation of questioning was triggered – even if the suspect did not actually desire counsel's presence. Davis, 512 U.S. at 460. Extending the Edwards rule to those situations would impose "irrational obstacles to legitimate police investigative activity" because, under Edwards, police could not thereafter question the suspect even if the suspect really did not wish counsel to be present. Id. Therefore, because legitimate police investigation may be thwarted by an equivocal or ambiguous invocation of the right to counsel, it is entirely reasonable to impose an affirmative duty on a suspect to unambiguously assert that right.

However, there is good reason to allow a more flexible rule in determining whether a suspect has invoked the right to silence. First, a suspect's invocation of the right to silence has a much less drastic effect on police investigation. Unlike the Edwards rule, when a

suspect who once waived his Miranda rights later chooses to invoke his right to silence and cut-off questioning, the police are not precluded under Mosley from trying to question him again later, as long as they "scrupulously honor" the request to stop questioning when made. Mosley, 423 U.S. 96, 103-04. Thus the Mosley rule provides only a temporary hindrance to further police investigation, in part, because an individual's invocation of the right to silence raises no presumption that he is unable to deal with the police on his own without an attorney. Id. at 110, n.2 (White, J., concurring); Arizona v. Roberson, 486 U.S. 675, 683, 108 S.Ct. 2093, 2099, 100 L.Ed.2d 704, 714 (1988).

This difference, then, in both the effect of the invocation of the right to silence on police investigation and in the presumption about a suspect's ability to competently handle police interrogation on his own, justifies a different standard for the right to silence than the right to counsel. A lesser degree of certainty should be enough for one to invoke the right to silence.

There is presently a split among those jurisdictions that have considered whether to apply the same Davis "clear articulation rule" to the right to silence. While a number of jurisdictions, like Wisconsin, have applied the Davis rule to the right to silence, others have declined, and still others have expressly considered the question, yet, recognizing that this Court has not yet spoken on the issue, have chosen not to decide whether to apply Davis to the right to silence. This creates an intolerable lack of uniformity in the state and federal courts about a constitutional right that is affected daily in police interrogations throughout

the country. Such divergent results which depend on the geographic location of the prosecution should not be tolerated when important constitutional rights like the Fifth Amendment right to silence are affected.

To date, four federal circuits have either ruled directly that Davis applies to the invocation of the right to silence, or used similar language requiring the invocation to be unambiguous to be properly invoked. See United States v. Nelson, 450 F.3d 1201, 1211-12 (10th Cir. 2006) (applying objective Davis inquiry to determine whether defendant invoked right to remain silent); United States v. Hurst, 228 F.3d 751, 760 (6th Cir. 2000) (asking whether defendant made a "clear and unequivocal assertion of his right to remain silent," but not expressly ruling Davis applies); Simmons v. Bowersox, 235 F.3d 1124, 1131 (8th Cir. 2001) (asking whether defendant made unequivocal or unambiguous assertion of right to remain silent, but not directly answering whether Davis applies); Medina v. Singletary, 59 F.3d 1095, 1101, n.2 (11th Cir. 2004) (acknowledging that Davis did not address right to silence, but observing "parallels" in the law for both the right to counsel and the right to silence).

On the other hand, five federal circuits have declined to address the issue, and instead either expressly or implicitly left open the premise that the invocation of the right to silence should be treated differently than the right to counsel. See United States v. Rodriguez, 518 F.3d 1072, 1078, n.5 (9th Cir. 2008) (declining to decide whether Davis applies to right to silence and noting four other cases from 9th Circuit also declined to decide); James v. Marshall, 322 F.3d 103,

108 (1st Cir. 2003) (holding open question of whether Davis applies to right to remain silent); United States v. Ramirez, 79 F.3d 298, 305 (2d Cir. 1996) (assuming Davis applies to right to remain silent, but not holding for certain that it does); Burket v. Angelone, 208 F.3d 172, 200 (4th Cir. 2000) (declining to address whether Davis applies to right to remain silent); Soffar v. Cockrell, 300 F.3d 588, 594 n.5 (5th Cir. 2002) (same); Evans v. Demosthenes, 98 F.3d 1174, 1176 (9th Cir. 1996) (same).

Similarly, the states are split on whether the Davis "clear articulation rule" applies to the right to silence.

Several state courts have either rejected the application of Davis to the right to silence, or applied different state law. See State v. Strayhand, 911 P.2d 577, 592 (Ariz. 1995) (Davis does not extend to right to silence context); State v. Hoey, 881 P.2d 504, 524 (Haw. 1994) and State v. Rogan, 984 P.2d 1321, 1249 (Haw. 1999) (both rejected Davis and accorded broader rights under state constitution); State v. Farley, 452 S.E.2d 50, 59, n.12 (W. Va. 1994) (declining to adopt Davis); State v. Chew, 695 A.2d 1301, 1318 (N.J. 1997) (same); State v. Jones, 6 P.3d 58, 61-62 (Wash. 2000) (rejecting Davis rule); See also, State v. Pena, 98 P.3d 857, 866-68 (Wyo. 2004) (discussing policy reasons why clear articulation should not be necessary in right to silence context, but reserving "definitive determination" for another day).

Other states, like Wisconsin, have extended Davis to the right to silence. See Bowen v. State, 911

S.W.2d 555, 565 (Ark. 1995) (applying federal law), cert. denied, 517 U.S. 1226 (1996); State v. Owen, 696 So. 2d 715, 718-19 (Fla. 1997) (applying state law); State v. Williams, 535 N.W.2d 277, 284-85 & n.3 (Minn. 1995) (applying prior state case law); People v. Cohen, 226 A.D.2d 903, 904 (N.Y. App. Div. 1996); Dowthitt v. State, 931 S.W.2d 244, 257 (Tex. Crim. App. 1996); State v. Levya, 951 P.2d 738, 743 (Utah 1997) (Davis applicable only after waiver; but not specifically addressing if applicable to postwaiver ambiguous indications of right to silence); State v. Bacon, 658 A.2d 54, 65 (Vt. 1995) (applying federal law), cert. denied, 516 U.S. 837 (1995); Midkiff v. Commonwealth, 462 S.E.2d 112, 116 (Va. 1995) (relying on state case law).

Given such disparate treatment of a bedrock constitutional right like the Fifth Amendment's right to silence, this Court should accept review and decide whether to apply the same Davis "clear articulation rule" to the right to silence or whether a lesser degree of certainty will suffice to invoke the right to silence and to cut-off police questioning.

In addition to the disparate enforcement of the right to silence under presently developing law, those court decisions which have extended the Davis rule to a suspect's exercise of the right to cut-off police questioning are in conflict with this Court's pronouncement in Mosley, that "[i]f the individual indicates in any manner, at any time prior or during questioning, that he wishes to remain silent, the interrogation must cease." 423 U.S. at 104 (emphasis added). Under that long standing rule, no "unambiguous" statement of the suspect seems

necessary to sufficiently invoke the right to silence and cause the police to stop questioning.

Yet, those jurisdictions which have extended the Davis rule to the right to cut-off police questioning have failed to heed Mosley, and in the process the right to silence and to cut-off police questioning has been dramatically diminished. That diminution is amply demonstrated in this case, where the court of appeals ruled that Stephens "did not make a clear articulation that he wanted to terminate the interrogation," APP 6, even though it was undisputed that he said: "I don't want to talk to you, punk." The court of appeals transformed even such a plain and direct declaration as this into an ambiguous statement.

Another recent case in Wisconsin provides further evidence of how the application of the Davis rule to the right to silence has lead to the decay of that right. In State v. Markwardt, 2007 WI App 242, ¶ 36, 306 Wis. 2d 420, 742 N.W.2d 546, the Wisconsin court of appeals went so far as to rule that a suspect will be held to have insufficiently invoked the right to silence "if any reasonable competing inference can be drawn. Accordingly, an assertion that permits reasonable competing inferences demonstrates that a suspect did not sufficiently invoke the right to remain silent." Such pronouncements are simply irreconcilable with Mosley's rule that a suspect can invoke the right to silence "in any manner." Such a rule turns on its head this Court's usual presumption against the implicit waiver of constitutional rights. See Brewer v. Williams, 430 U.S. 387, 404, 97 S.Ct. 1232, 51 L.Ed.2d. 424 (1977) ("courts indulge in every reasonable presumption against

waiver" of important constitutional rights).

A better way to determine whether an individual has sufficiently invoked the right to silence and right to cut-off custodial police questioning can be derived from the plain language of Miranda and Mosley.

The Miranda court described in detail the "inherent pressures of the interrogation atmosphere," which can tend to overwhelm an individual's free will. 384 U.S. at 448-68. To protect against that coercive atmosphere, the court adopted the Miranda warnings as a means to "notify the person of his right of silence and to assure that the right will be scrupulously honored." Id. at 479. The Mosley court identified as the "critical safeguard" an individual's right to cut-off questioning. Mosley, 423 U.S.96, 103. "The requirement that law enforcement authorities must respect a person's exercise of that option counteracts the coercive pressures of the custodial setting." Id. Therefore, to ensure "that the resulting statement is the reliable product of free will," the court ruled that "if the individual indicates in any manner . . . that he wishes to remain silent, the interrogation must cease." Id. at 100 (emphasis added), citing Miranda, 384 U.S. at 473.

The use of the phrase "indicates in any manner" surely contemplates a more flexible standard for the invocation of the right to silence than that employed in Davis. Thus, this Court should accept review in this case and rule that a broader standard applies to the right to silence whereby a suspect need only indicate, in any manner, a desire that could reasonably be interpreted by the police as intended to stop the

questioning. This imposes a duty on the individual to assert the right by some words or conduct, but does not require a burden so inflexible that it conflicts with the language of Miranda and Mosley that the right may be invoked "in any manner." The objective standard of reasonableness in such a standard still provides a bright enough line for law enforcement, without demanding of the suspect a linguistic burden worthy of "an Oxford don." Davis, 512 U.S. at 4549.

Accordingly, for all of these reasons, this Court should grant the petition for a writ of certiorari to resolve this split in the state and federal courts of this country and to decide whether the same degree of certainty is required to exercise the right to cut-off police questioning as this Court required for the invocation of the right to counsel.

II. This Court should grant certiorari and rule that even if the "clear articulation rule" applies to the right to silence, an individual who directly and plainly tells a detective "I don't want to talk to you anymore," has sufficiently invoked his constitutional right to cut-off questioning so that further questioning must cease.

Even if this Court believes the Davis rule should apply equally to the invocation of the right to silence, the declaration made by the Petitioner in this case should be held to demonstrate an unambiguous assertion of that right.

At the police station, Stephens initially agreed to speak and answered a number of questions. However,

the invocation of his right to silence could not have been made clearer when, in the presence of both officers, he slammed his fist on the table and said, according to the detective, that he "was not going to talk to me anymore and referred to me as a punk." R.43:43,73.

Other courts interpreting similar language have found it to be sufficiently unequivocal to invoke a defendant's constitutional rights. See, State v. Goetsch, 186 Wis.2d 1, 7-8, 519 N.W.2d 634 (Ct. App. 1994) ("I don't want to talk about this anymore" was sufficient to invoke right to silence); State v. Dagnall, 2000 WI 82, ¶ 18, 236 Wis. 2d 339, 351 (trial court suggested the phrase, "I don't want to talk to you guys" as an example of an "express statement" which would capably assert right); State v. Hannan, 636 N.W.2d 796, 801-02 (Minn. 2001) ("I don't want to talk anymore please" constituted invocation of right to silence); State v. Strayhand, 184 Ariz. 572, 590-91, 911 P.2d 577, 584-85 (Ariz. App. 1995) (court held that "[d]efendant's first invocation,'well I don't want [to] answer anymore' could not have been clearer"); State v. Belcher, 520 So.2d 303, 304, (Fla. App.3 Dist., 1988) ("I don't want to talk to you anymore" was valid invocation); Stinett v. State,720 S.W.2d 663, 668 (Tex. App. 1986) ("I don't want to talk anymore" expressed "clear desire to cut off questioning"); State v. Bishop, 621 P.2d 1196, 1198 (Or. App. 1980) ("I don't want to talk about it" was clear invocation of rights); Law v. State, 318 A.2d 859 (Md. App. 1974) ("I don't want to talk anymore " was proper invocation of rights); People v. Rose, 75 Ill. App.3d 45, 53-54, 393 N.W.2d 698, 705 (1979) ("I don't want to talk to you anymore" held to invoke right to remain silent).

When a suspect made a similar statement, "I don't want to talk no more," the Seventh Circuit Court of Appeals warned that law enforcement must "stop the questioning....The subject of the inquiry has a constitutional right not to talk; the government and its agents have a constitutional duty to respect that right." Davis v. Greer, 13 F. 3d 1134, 1138 (7th Cir. 1994).

In this case, not only did the detective fail to respect Stephens' right to terminate questioning, his followup questions did not "clarify" the defendant's intent. Rather, they confused matters by conflating his right to counsel with his independent right to cut off questioning at any point he desired. The detective's query whether he "was invoking his right to have representation or if he would still speak to us," R. 43: 43-44, served as a diversion by blurring the two rights. The right to remain silent is separate and distinct from the right to counsel, which the detective's questions failed to recognize. See State v. Strayhand, supra, 184 Ariz. at 591, 911 P.2d at 585.

The court of appeals in this case interpreted the Stephens' comment: "I'm not going to talk to you anymore," as only a refusal to talk further to one specific officer, i.e., the detective who aggressively confronted him. In reaching that conclusion, the court ignored testimony by the other officer present when the statement was made. He described Stephens' invocation of his right to remain silent more broadly: "he said he didn't want to, I believe talk at this time." R.43: 27 (emphasis added). That officer's version of the exchange does not support the court of appeals' conclusion that Stephens' refusal to talk only applied to the detective.

The trial court judge never resolved this discrepancy between the two officers' versions, and expressly found both officers credible. R.43: 100. The court of appeals simply ignored the trial court's finding and ruled that "implicitly the court found the officers' testimony to be more credible" than the defendant's. APP. 5, ¶ 9, n. 1. Yet there was no dispute between the defendant's testimony and the officers as to whom he directed his statement. On the contrary, the trial court found that Stephens' statement was made in the presence of both officers. R.43: 104.

Moreover, the detective did not seem at all unclear about whether Stephens was only refusing to speak with him in particular. He did not testify that he was trying to discern whether Stephens would be willing to talk with another officer. Although he tried to justify continued questioning on the grounds that Stephens' statement and desire was ambiguous, he admitted that he would have continued to ask questions seeking to "clarify" even if the defendant had unambiguously said "I don't want to talk anymore," without adding "to you." R. 43: 62. This suggests that the detective's true intent was not to "clarify" anything, but rather to get Stephens to keep talking even after he asserted his right to remain silent. This he cannot do.

The court of appeals failed to heed both Mosley's warning that interrogation must cease if the suspect "indicates in any manner" that he wishes to remain silent, 423 U.S. at 100, and this Court's pronouncement in Davis that the suspect need not "speak with the discrimination of an Oxford don." 512 U.S. at 459. It would impose an unconstitutional level of precision to

expect a suspect in an inherently coercive situation to meet the standard the court of appeals applied in order to assert his constitutional rights. Stephens' declaration was sufficiently clear that a reasonable officer would understand he was invoking his right to remain silent.

CONCLUSION

For all of these reasons, this Court should grant certiorari and hold that the "clear articulation rule" of Davis does not apply to the Fifth Amendment right to remain silent. Even if the Davis rule applies to the right to silence, this Court should rule that the Petitioner's statement to the police satisfied that standard and thus all police questioning should have ceased immediately.

Dated this 23rd day of October, 2008.

Respectfully Submitted,

BUTING & WILLIAMS, S.C.

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No. 08-____

IN THE SUPREME COURT
OF THE UNITED STATES OF AMERICA

MARK A. STEPHENS,

Petitioner,

v.

STATE OF WISCONSIN,

Respondent.

On Petition for a Writ of Certiorari
to the Wisconsin Court of Appeals

APPENDIX

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(L.C. No. 2002CF886)

STATE OF WISCONSIN: IN COURT OF APPEALS
DISTRICT II

State of Wisconsin,

Plaintiff-Respondent,

FILED

v.

APRIL 23,2008

Mark A. Stephens,

Defendant-Appellant.

APPEAL from a judgment and an order of the circuit court for Waukesha County: Donald T. Hassin and J. Mac Davis, Judges. Affirmed.

Before Brown, C.J., Snyder and Neubauer, JJ.

¶1 PER CURIAM. Mark Stephens appeals from a judgment of conviction of armed burglary and from an order denying his postconviction motion alleging a breach of the plea agreement and ineffective assistance of counsel. He argues that his custodial statement to police should have been suppressed because he invoked his right to terminate the interrogation and that the plea agreement was breached when the prosecutor made reference to the presentence investigation reports

(PSI) recommendation that the sentence be made consecutive to another sentence Stephens was then serving. We affirm the circuit court's rulings and the judgment and order.

¶2 Stephens entered his neighbor's home under false pretenses and scuffled with the female homeowner when she caught him looking for money. Stephens pulled a knife during the scuffle and struck the victim. Stephens fled the house and was discovered by police hiding under a camper in his mother's yard.

¶3 Stephens was transported to the police station and had one hand cuffed to the table in the interrogation room when Officer Robert Kraemer read Stephens his Miranda rights. Stephens acknowledged understanding each of his rights and agreed to answer questions. He denied any wrongdoing and told Officer Kraemer he had been at home all day. Detective David Funkhouser entered the room and took over the interrogation. Detective Funkhouser employed a more aggressive approach and confronted Stephens with indicators of Stephens' guilt. Stephens slammed his hand on the table and declared he did not want to talk to Detective Funkhouser anymore and referred to the detective as a "punk." Detective Funkhouser twice asked Stephens if he was invoking his constitutional right to representation or cease questioning. Stephens indicated that he would continue to speak but was not happy about having to talk to Detective Funkhouser. Thereafter Stephens was confronted with the discovery of the knife in his car. Stephens then admitted his criminal conduct to Detective Funkhouser. The police wrote a statement in question and answer form and

Stephens signed it.

¶4 Stephens moved to suppress his oral and written admissions. The motion was denied. Stephens then entered a guilty plea to the armed burglary charge. The plea agreement called for charges of kidnaping and substantial battery while armed to be dismissed and read in at sentencing. The prosecution agreed to argue for substantial prison time but take no position on whether the sentence should be consecutive or concurrent to a previous sentence.

¶5 In a revised sentencing recommendation, the PSI recommended that the sentence be made consecutive. At sentencing, the prosecution pointed out that its recommendation was for substantial prison time. It noted that Stephens was serving time after the revocation of parole until October 30, 2009, and "[t]hat's the sentence to which the presentence writer indicates their recommendation should be consecutive." The prosecution emphasized the need to give the victim a sense of security by imposing a substantial prison term. The prosecution then explained how it had alerted the PSI author to a mistake in the maximum available and that the maximum is sixty years. The prosecution commented next:

If the Court were to adopt the recommendation of the presentence and make this a period of initial confinement of 20 years consecutive to what he's currently serving, he would be released in the year 2029; and he would be 67 years old. He's currently 44, would be 47 when the sentence in 2006 ends.

¶6 A motion for postconviction relief alleged that

the prosecution had breached the plea agreement by not stating that it took no position on the imposition of a consecutive or concurrent sentence and by comments that essentially adopted the PSI recommendation that the sentence be consecutive. Because no objection was made to the prosecution's sentencing argument, the postconviction motion alleged trial counsel was ineffective for not objecting. The motion was heard by a judge different than the sentencing judge. The court heard an offer of proof that trial counsel would testify that he had no strategic reason for failing to object to comments allegedly breaching the plea agreement; trial counsel did not testify. The court found that the prosecution's first reference to the consecutive recommendation in the PSI was a point of clarification on the sentencing court's invitation to explain why there was a revised PSI recommendation. It concluded there was not a substantial and material breach of the plea agreement. Stephens appeals.

¶7 When reviewing a decision on a motion to suppress statements we sustain the trial court's historical findings of fact unless they are clearly erroneous. See State v. Ross, 203 Wis. 2d 66, 79, 552 N.W.2d 428 (Ct. App. 1996). Whether the defendant's constitutional rights were violated is a "constitutional fact" determined without deference to the trial court. Id.

¶8 A defendant's Fifth Amendment right to remain silent includes the right to cut off an interrogation and must be "scrupulously honored." Michigan v. Mosley, 423 U.S. 96, 104 (1975); Ross, 203 Wis. 2d at 74. The defendant must unambiguously terminate the interrogation. Ross, 203 Wis. 2d at 74-75. "A suspect

must, by either an oral or written assertion or non-verbal conduct that is intended by the suspect as an assertion and is reasonably perceived by the police as such, inform the police that he or she wishes to remain silent. " Id. at 78. The articulation must be sufficiently clear "'that a reasonable police officer in the circumstances would understand the statement to be' an invocation of the right to remain silent." Id. (citation omitted). It is not necessary for the interrogation to cease if the suspect does not unambiguously invoke his or her right to remain silent. Id. Of greater importance here is the recognition that given an equivocal or ambiguous request to remain silent, the police need not ask the suspect clarifying questions on that request but that it is good police practice to do so. Id.

¶9 In the wake of Stephens's assertion that he did not want to talk "to you, punk," Detective Funkhouser sought to clarify whether Stephens was invoking his constitutional right to remain silent. The clarifying questions were not unreasonable because Stephens directed his words to the detective as demonstrated by calling the detective a punk.[3] The declaration that a suspect does not wish to speak to a specific officer is not the invocation of his right to remain silent. See State v. Owen, 202 Wis. 2d 620, 641, 551 N.W.2d 50 (Ct. App. 1996). Stephens did not make

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[3]We recognize, as Stephens points out in his reply brief, that the trial court did not make a finding on the exact language Stephens used. Implicitly the court found the officers' testimony to be more credible. It was undisputed that Stephens called Detective Funkhouser a punk when indicating he didn't want to speak.

a clear articulation that he wanted to terminate the interrogation and the detective was not required to immediately walk away.[4] In asking two separate clarifying questions whether Stephens was invoking his right to representation and whether Stephens was invoking his right to remain silent—Detective Funkhouser was doing good police work in an attempt to determine whether Stephens was invoking a right. Nothing suggests that the clarifying questions themselves were coercive or threatening. Stephens had been fully advised of his Miranda rights and when asked to clarify if he wanted to terminate the interrogation, he indicated he did not. His constitutional right to remain silent was not violated.

¶10 An actionable breach of the plea agreement must be a material and substantial breach such that it "defeats the benefit for which the accused bargained." State v. Williams, 2002 WI 1, ¶38, 249 Wis. 2d 492, 637 N.W.2d 733. Whether the prosecution has breached the plea agreement in a material and substantial way is a question of law that we review independent of the trial court. Id., ¶20. When the issue is presented to this court under an ineffective assistance of counsel claim because counsel failed to object to the alleged breach of the plea agreement, we first determine whether there was, in fact, a material and substantial breach of the plea agreement. State v. Sprang, 2004 WI App 121, ¶13, 274

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[4]Because Stephens did not invoke his right to remain silent, we need not consider the five factor test set forth in State v. Hartwig, 123 Wis. 2d 278, 284, 366 N.W.2d 866 (1985), for determining whether police scrupulously honored the invocation.

Wis. 2d 784, 683 N.W.2d 522.

While a prosecutor need not enthusiastically recommend a plea agreement, the court of appeals has stated that he or she "may not render less than a neutral recitation of the terms of the plea agreement." "End runs" around a plea agreement are prohibited. "The State may not accomplish by indirect means what it promised not to do directly, and it may not covertly convey to the trial court that a more severe sentence is warranted than that recommended." Williams, 249 Wis. 2d 492, ¶42 (footnotes omitted).

¶11 Stephens argues that the plea agreement was breached because the prosecution did not restate the entire agreement in its initial sentencing argument. Stephens cites no support for his proposition that it was the prosecutor's obligation to fully restate the agreement at the time of sentencing. We are not persuaded that the prosecution was required to restate the plea agreement restrictions. As the postconviction court aptly noted, the prosecution did not agree to restate the entire plea agreement at sentencing or explicitly inform the sentencing court that it had no position on whether the sentence be concurrent or consecutive. Although the prosecution made reference to the plea agreement in first stating its recommendation for substantial prison time, it did not in fact make any recommendation on whether the sentence be concurrent or consecutive.[5] It was not, as

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[5]The prosecution stated: My recommendation, as the Court's aware, was represented at the time of the plea, is that (continued...)

Stephens suggests, a misrepresentation by omission to not highlight the prosecution's promise not to make a recommendation on whether the sentence be concurrent or consecutive. The reference to the PSI's recommendation of a consecutive sentence immediately after stating the recommendation for substantial prison was simply an explanation of the PSI.

¶12 We reject Stephens's suggestion that the plea agreement was breached by the emphasis the prosecution gave to the victim's statement. The victim indicated to the sentencing court her fear that Stephens, if released in the next forty years, would return to harm her and her family. The prosecution referred to her remarks at the start of its sentencing argument.[6] The sentencing court is permitted to consider the comments and wishes of the victim. State v. Johnson, 158 Wis. 2d 458, 465, 463 N.W.2d 352 (Ct. App. 1990). The prosecution's discussion of how the crime impacts the victim is relevant to the nature of the

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[5](...continued)
you impose a substantial prison sentence. Mr. Stephens is currently, Judge, serving time, after having been revoked from parole, until October 30th, I believe, of 2009. That's the sentence to which the presentence writer indicates their recommendation should be consecutive.

[6]The prosecution stated: [T]his sentencing should not be about Mr. Stephens. It should be about the victim, Judge. Your sentence here today perhaps can give back some sense of safety. It will never totally come back for this victim, Judge. It's gone. Mr. Stephens has destroyed that, as she indicated. But this Court can perhaps give her some small feeling of safety in her home again.

crime. State v. Naydihor, 2004 WI 43, ¶27, 270 Wis. 2d 585, 678 N.W.2d 220. It also bears on the need to protect the public. The prosecution's comments on the victim's wishes supported the recommendation for substantial prison. We reject Stephens's contention that the prosecution implicitly recommended a consecutive sentence because, in Stephens's opinion, the forty-year sentence the victim wanted could only be accomplished by a consecutive sentence.[7] The prosecution's emphasis on the victim's wishes did not make an end run around the plea agreement.

¶13 Stephens argues that the prosecution's reference, not once, but twice, to the PSI's recommendation of a consecutive sentence breached the plea agreement by implicitly adopting the PSI recommendation. As we have already stated, the first reference to the PSI consecutive recommendation was to explain the PSI. The PSI did not indicate what the sentence should be made consecutive to. Moreover, that reference was followed by a discussion of discrepancies in the PSI of Stephens's prior record. It was part of a larger discussion of the sentences previously imposed on Stephens to help the court understand the errors in the PSI on Stephens's prior record.

¶14 The second reference to the PSI's consecutive recommendation came at the conclusion of the prosecution's argument. The reference to Stephens's age at the completion of the PSI recommended sentence was factual only and didn't suggest that one age was better

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[7]Stephens faced a maximum prison term of sixty years with the possibility of forty years' initial confinement.

than the other. Age is an appropriate sentencing consideration so it was not inappropriate for the prosecution to provide that information. "A prosecutor may convey information to the sentencing court that is both favorable and unfavorable to an accused, so long as the State abides by the plea agreement." Williams, 249 Wis. 2d 492, ¶44. We are not persuaded that the references to the PSI's consecutive recommendation was an implicit adoption of the PSI recommendation or a breach of the plea agreement.

¶15 Even if we considered the comment to be an end run around the prosecution's promise not to take a position on whether the sentence should be concurrent or consecutive, it was not a substantial and material breach of the agreement. Stephens cites Sprang, 274 Wis. 2d 784, and Williams, 249 Wis. 2d 492, as illustrative of the circumstances in which the prosecution's reference to the PSI constituted a breach of plea agreements. In both Sprang, 274 Wis. 2d 784, ¶24, and Williams, 249 Wis. 2d 492, ¶¶48-50, the plea agreement was undercut by the prosecution's adoption of information in the PSI to cast doubt on the wisdom of the plea agreement. See also State v. Wills, 187 Wis. 2d 529, 538, 523 N.W.2d 569 (Ct. App. 1994), aff'd., 193 Wis. 2d 273, 533 N.W.2d 165 (1995) (finding a breach the court concluded that "the prosecutor was required to argue to the trial court that the agreement was consistent with the appropriate sentencing criteria. If the prosecutor could not support the agreement, she should not have committed the State to it.").

¶16 Here, at no point did the prosecution cast doubt on the plea agreement. This case is closer to

Naydihor, 270 Wis. 2d 585, ¶¶27, 30, where there was no breach of the plea agreement because the prosecution did not imply to the sentencing court that it believed a more severe sentence than that recommended was appropriate and the information the prosecution discussed was relevant to appropriate sentencing factors. The agreement for "substantial prison" permitted leeway to the prosecution in how to justify that recommendation. The prosecution continued to support the plea agreement by recommending substantial prison and providing information that supported substantial prison time. In short, Stephens was not deprived of the benefit of the agreement not to have the prosecution make a recommendation on whether the sentence was to be consecutive or concurrent. Thus, references to the PSI's consecutive recommendation were not substantial or material breaches. Trial counsel was not constitutionally deficient for not objecting at sentencing.

By the Court.—Judgment and order affirmed.
This opinion will not be published. See Wis. Stat. Rule 809.23(1)(b)5. (2005-06)

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You are hereby notified that the Court has entered the following order:

No. 2006AP2809-CR State v. Stephens
L.C.#2002CF886

A petition for review pursuant to Wis. Stat. § 808.10 having been filed on behalf of defendant-appellant-petitioner, Mark A. Stephens, and considered by this court;

IT IS ORDERED that the petition for review is denied, without costs.

David R. Schanker
Clerk of Supreme Court